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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933.

No. 89

LIFE & CASUALTY INSURANCE COMPANY OF TENNESSEE, APPELLANT,

vs.

OSSIE McCRAY, APPELLEE

BRIEF OF APPELLEE

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Appellee.

INDEX

		Page
Point A.	Validity of Section 6155 of Crawford & Moses' Digest	3
Point B.	No Federal question raised on effect of Tennessee contract	4
Point C.	Effect of Tennessee contract not applicable to Arkansas contract	6
Point D.	Appellant estopped	6

CITATION

Minneapolis F. & M. Mut. Ins. Co. v. Norman, 74 Ark. 191 6

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Answering appellant's brief as summarized therein at pages 7-8:

Point A

The claim is that Section 6155 of Crawford & Moses' Digest (the attorney's fee and penalty statute) is unconstitutional under the Due Process clause of the Fourteenth Amendment and of Article 1, Section 10 of the Federal Constitution forbidding the impairment of a contract by a State.

In order to save repetition we request that our brief in "Statement Opposing Jurisdiction and Motion to Dismiss or Affirm," pages 4 to 10, entitled "The Validity of Section 6155 of Crawford & Moses' Digest," be accepted as our reply to the brief on this subject.

There is the further answer that the charge that attorney's fee and penalty statute of Arkansas in insurance cases is in violation of Article 1, Section 10, of the Constitution against impairment of contracts, is that it was not raised in the pleadings in the lower court; and a further answer is that in the "Agreed Statement of Facts" copied in the record at pages 11-13, in paragraph 1, page 11, it is stated "That said policy of insurance is an Arkansas contract."

Our brief heretofore referred to, pages 1 to 4, presented the fact that it was an Arkansas contract; and gives the decisions of the Supreme Court of Arkansas construing this provision of the policy as to reinstatements (all of which were decided before the policy in this case was issued to McCray), wherein it was held that no new contract was made.

Point B

It is insisted that prior to the issuance of this policy, the Tennessee Court had held that a lapsed policy when reinstated became a new contract from the date of the reinstatement, and this decision as applied to a policy issued thereafter became a part of the policy contract to the same extent as if written in full therein.

If this was a Tennessee contract, instead of an Arkansas one, this might be a correct statement; but even if a Tennessee contract, the fact that it was claimed to violate the provisions of the Federal Constitution must have been affirmatively alleged in the lower court.

In the record, pages 2 to 4, is the Answer, which is that the company was not liable because the assured had violated the suicide clause, having committed suicide from one year from the date of reinstatement and the reinstatement was a renewal of the policy as a new contract and the suicide clause ran from reinstatement, not the original date; but did not aver that any contrary rulings would offend any provision of the Federal Constitution. The effect of the Answer was to limit recovery to premiums paid, $34.08.

In fact, no Federal question was raised until after the hearing, after the motion for a new trial (which in Arkansas is the assignment of error) had been made, which is set out at page 6 of the record; but thirteen days thereafter a supplemental motion was filed wherein Section 6155 of Crawford & Moses' Digest (the penalty statute) was attacked as contrary to the Due Process Clause of the Fourteenth Amendment and the Equal Protection Clause (R. pp. 7-9).

Not until the case got into this Court was it discovered that rendering judgment on this policy would be in conflict with any provision of the Federal Constitution; the only Federal question presented was as to attorney's fees and 12 per cent penalty.

Point C

It is insisted that the Tennessee statute makes it unlawful to pay this policy because differing from what the effect of a similar policy would be in Tennessee. This, like other phases of it, was not presented in the state courts and overlooks the fact that it was stipulated that this was an Arkansas contract.

Point D

This is another attempt to raise the point not heretofore presented, which is, that to pay this judgment would be unlawful discrimination under Section 6132 of the Code of Tennessee, subjecting the company to the penalties of the statutes of both states.

If it were open to the appellant to raise the question that the contract it made in Arkansas was in violation of the laws of Tennessee, the domicile of the company, the answer to it is given by Judge Thompson in his work on Corporations quoted in *Minneapolis F. & M. Mut. Ins. Co.* v. *Norman*, 74 Ark. 191, as follows:

> "And that, as the domestic citizen is not required to see that the foreign corporation has observed the laws before he enters into a contract with it, there is no reason, founded in public policy, which will enable a solvent foreign corporation, which has violated the domestic law in making contracts and receiving consideration therefor from an innocent citizen, to escape liability for its performances by setting up its own turpitude."

It is submitted that the appeal is taken for delay and has no merit to it.

Respectfully submitted,

JOSEPH M. HILL,
HENRY L. FITZHUGH,
Attorneys for Appellee.